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Attorneys for Defendant Apple Inc.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

AliveCor, Inc.,

CASE NO. 4:21-CV-03958-JSW-SK

Plaintiff,

V.

Apple Inc.,

**DEFENDANT APPLE INC.'S
ADMINISTRATIVE MOTION FOR
LEAVE TO FILE SUR-REPLY TO
ALIVECOR, INC.'S MOTION FOR AN
ADVERSE JURY INSTRUCTION**

Defendant.

The Honorable Jeffrey S. White

1 Apple respectfully moves this Court, pursuant to Civil Local Rule 7-11, for leave to file a Sur-
 2 Reply to correct statements made in AliveCor's Reply Brief in Support of its Motion for an Adverse
 3 Jury Instruction (Dkt. No. 161-1). The proposed Sur-Reply is attached hereto as Exhibit 1.

4 Apple seeks leave to file its Sur-Reply to address new arguments and characterizations made
 5 for the first time in AliveCor's Reply. *See, e.g., Acer, Inc. v. Tech. Properties Ltd.*, 2012 WL
 6 6053968, at *1 (N.D. Cal. Dec. 4, 2012) (permitting Sur-Reply where Reply motion introduced new
 7 arguments and new evidence). Specifically, although AliveCor's opening papers said nothing about
 8 Mr. Cha's 240,000 custodial files from which Apple produced documents, AliveCor on Reply made
 9 several new and untrue statements regarding the nature of those files. AliveCor's Reply characterizes
 10 these documents as junk or potentially personal files unrelated to Mr. Cha's work at Apple. Dkt.
 11 161-1 at 1, 6.

12 This characterization is not supported by any evidence and, indeed, is contrary to the facts.¹
 13 Apple's proposed Sur-Reply provides the Court with those facts, which cannot be harmonized with
 14 AliveCor's characterizations. Moreover, AliveCor's misleading characterizations about the nature of
 15 the documents are not part of the sealed briefing, and thus may unfoundedly harm Apple's reputation
 16 even if disregarded by this Court. Dkt. 161-1 at 1, 6. Thus, the harm to Apple here is not just that the
 17 new arguments were made in Reply, but that they are categorically false and do an injustice to Apple
 18 and its reputation.

19 For these reasons, Apple respectfully requests that this Court grant leave to file the
 20 accompanying Sur-Reply responding to the arguments made for the first time in Plaintiff's Reply.

21
 22 DATED: April 21, 2023

Respectfully submitted,
 GIBSON, DUNN & CRUTCHER LLP

24 By: /s/ Jason C. Lo

25 Jason C. Lo

26 _____
 27 Attorney for Defendant Apple Inc.

28 ¹ Because the statements at issue in AliveCor's Reply are lawyer arguments, and not "evidence,"
 Apple does not believe that the proposed Sur-Reply is governed by Local Rule 7-3(d)(1). Nor
 would Local Rule 7-3(d)(1) provide an appropriate remedy, given that it would limit Apple only
 to "stating its objections to the new evidence."